April 13, 2004

BY FEDERAL EXPRESS
Office of the Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: **CAN-SPAM Act Rulemaking**
       Project No. R411008

Dear Sir or Madam:

ValueClick submits the following comments in response to the Federal Trade
Commission's March 11, 2004 request for public comment ("RFPC"). ValueClick is the
leading global provider of Internet advertising solutions for online advertisers and
website publishers. Headquartered in Westlake Village, California, ValueClick's
subsidiaries include Mediaplex, Commission Junction, AdWare Systems, Inc. and Hi-
Speed Media.

A.   **Criteria for Determining Whether "The Primary Purpose"**
      of an Electronic Mail Message is Commercial

ValueClick supports the use of the "net impression" standard suggested in the RFPC.
Such an approach is easy to understand and would provide predictability since parties
could reference existing case law on the application of this test. In addition, this test
avoids some of the more complicated analyses suggested in the RFPC and eliminates the
need for expert testimony.

B.   **Modifying What Is a "Transactional or Relationship Message"**

ValueClick supports clarifying the definition of a "relationship message" as it pertains to
changes regarding the recipient's membership or status. ValueClick believes that the
definition should include periodic messages to consumers reminding them that they are
included in the sender's database or have been added to such database and how they may
opt-out. Encouraging such messages benefits consumers through increased awareness
about the lists they are on and their ability to opt-out of such lists.

In addition, if a consumer registers at a web site and affirmatively requests certain
defined information (as distinct from "items of interest"), the delivery of such

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information also should be considered a relationship message since such delivery is the very service requested by the consumer. For example, if a consumer visits a travel website and affirmatively requests information about trips to Jamaica, the delivery of information about Jamaican tour packages should not be considered a commercial email message since the primary purpose is not to promote a product or service but to respond to a consumer inquiry.

To the extent that relationship messages contain an advertisement, we believe that the "net impression" standard should be applied to determine whether it is a relationship message or an advertisement.

C. Modifying the 10-Business-Day Time Period for Processing Opt-Out Requests

ValueClick opposes the shortening of the opt-out processing period at this time. Prior to the effective date of the Act, accepted business practice was to provide an opt-out link for the marketing company or list manager transmitting the email message but not for the advertiser. With the enactment of CAN-SPAM, advertisers had to receive and process opt-out requests for the very first time. While ValueClick and its subsidiaries are able to process such requests within one or two business days, given that this is a new area for many advertisers we do not believe that the processing period should be modified at this time.

D. Identifying Additional "Aggravated Violations"

ValueClick believes additional aggravated violations should include infringement of intellectual property rights, such as using pirated content or falsely suggesting any affiliation or involvement of a third party in the spam. Many spammers use content and/or links pirated from legitimate companies or falsely claim that the recipient opt-ed in to another company. This may take the form of a spam email (i) using a third party's opt-out link; (ii) pirating an HTML image or other content from a third party, or (iii) containing a false representation that "you are receiving this email because you opt-ed in with Legitimate Company X." In each case the spammer is able to inflict substantial damage to the reputations of companies involved.

E(1). Multiple Senders

The question of compliance in instances of multiple advertisers has caused much confusion among advertisers and marketers. While we appreciate the need to respect a consumer's desire not to receive emails from a particular advertiser, ValueClick believes that the case of emails with multiple advertisers is different. These emails are to a greater extent promoting the marketer who packages the advertisements than any individual advertisers.

In emails with multiple advertisers, consumers should be able to opt-out from receiving further messages from the marketer instead of having to use separate opt-out mechanisms for each advertiser. In such cases, advertisers should not be penalized if the email goes to someone who previously unsubscribed from the advertiser but not the marketer. Requiring a marketer sending a message with multiple advertisers to scrub its lists for each advertiser's opt-out list would be burdensome and reduce the reach of this inexpensive method of marketing since advertiser "A" would be precluded from reaching anyone who has opted out from advertisers "B" through "Z" who also are included in the email.

Penalizing multi-advertiser emails would only increase the number of emails consumers receive, since advertisers would be forced to use solo emails to reach their audience. Instead of one email with 10 advertisers, consumers would now receive 10 emails. Thus, restricting multi-advertiser emails would both limit consumer choice and clutter their in-boxes.

E(2). Sender Definition.

Despite the initial confusion regarding the definition of the term "sender" arising from the fact that it is used in the Act in a manner completely different than its normal usage, we believe that the Act and the legislative history adequately address this point.

E(3). Forward to a Friend Emails

This type of marketing is very useful for consumers since they only receive the email because someone who knows them believes it will be of interest to them. ValueClick believes that a balance should be struck between a consumer's right to receive information of interest from their friends and compliance requirements of the Act. A proper balance would be to not hold the advertiser responsible for any email either (i) sent by the consumer or (ii) sent at the direction of the consumer to an address provided by such consumer to a party that had opted-out of receiving emails from the advertiser. This limited exception preserves the ability of consumers to freely share information. To the extent that a consumer uses a mechanism provided by the advertiser to forward the email, the email should comply with all other requirements of the Act and also identify the consumer forwarding the email.

E(4) P.O. Boxes

The principal rule of statutory construction is to give meaning to every word. If a valid physical postal address is distinct from a valid postal address what is excluded from the former that is included in the latter? ValueClick believes it is good policy to require a physical street address since a number of spammers use P.O. Boxes to hide their identities and avoid service of process.

E(5)   From Line

ValueClick believes some guidance on what is acceptable in the from line would be useful. Currently, there are a variety of practices as to email from lines. For example, the from line may identify the advertiser, the product promoted and/or the marketing company or list used. ValueClick believes each of these practices are permissible under the Act so long as it is not deceptive and uses a valid domain name that a consumer may confirm by conducting a "Who Is" search with any domain registrar.

G.   Bounty System

ValueClick believes that the concept of a bounty system is very well intentioned but is afraid that it most likely will be counterproductive. The FTC and state attorney generals barely have the resources now to process the thousands of emails forwarded to them each day. A bounty system will only increase this volume and add the burden of additional administration on the enforcement agencies.

H.   Studying CAN-SPAM Act

Any real solution to the problem of spam must involve both government and technology. In assessing the short term effectiveness of the CAN-SPAM Act, the FTC could monitor the extent to which messages comply with the Act, as well as the level of awareness among advertisers and consumers about the law. ValueClick believes that the greatest achievement of the Act in the short term may be increased awareness and, potentially, a migration of advertisers from suspect companies to legitimate marketers who comply with the Act.

With respect to the specific issues addressed in the RFPC, this could be addressed in a second FTC Spam Forum focusing exclusively on this question.
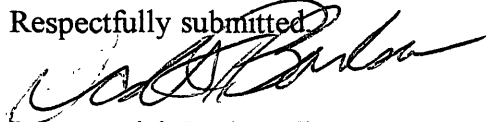
I.   Subject Line Labeling

ValueClick opposes any requirement that commercial email messages have an "ADV" label since the commercial nature of these emails is normally self-evident to consumers. In addition, given that messages with "ADV" labels are often filtered by anti-spam programs, such a requirement would impair the ability of marketers to reach consumers and for consumers to get the messages they have signed up for.

J.   Regulatory Flexibility Act

The advertising community, including many small businesses, was caught by surprise to learn that they were the "senders" under the Act's definitions and must now process opt-out requests. This proved to be a burden for a number of advertisers most of whom were small businesses. ValueClick believes that the FTC should explore the extent to which

the Act has affected or impaired the ability of small businesses to use email marketing as an advertising medium.

Respectfully submitted,

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ValueClick, Inc.